आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
" D " BENCH, AHMEDABAD
[Conducted Through Virtual Court]

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 1116/Ahd/2015

(निर्धारण वर्ष/Assessment Year : 2010-11)

Lonsen Kiri Chemical Industries Ltd. 7th Floor, Hasubhai Chambers Ellisbridge, Ahmedabad	**बनाम**/ Vs.	The DCIT (OSD)-1 Circle-4 Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCL 4527 B		
(अपीलार्थी/**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ **Appellant by :**	Shri T.P. Hemani, Sr.Adv & Shri Parimal Sinh Parmar, ARs
प्रत्यर्थी की ओर से/**Respondent by:**	Shri Dileep Kumar, Sr.DR

सुनवाई की तारीख/ **Date of Hearing**	06/08/2020
घोषणा की तारीख /**Date of Pronouncement**	19/08/2020

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals)–2, Ahmedabad [CIT(A) in short] vide appeal no. CIT(A)-2/DCIT (OSD)-I, Cir.4/241/13-14 dated 09/03/2015 arising in the assessment order passed under s.143(3) r.w.s.144C of the Income Tax Act, 1961(hereinafter referred to as "the Act") dated 12/03/2014 relevant to Assessment Year (AY) 2010-11.

2. The assessee has raised the following grounds of appeal:-

1. *The ld.CIT(A) has erred in law and on facts of the case in upholding the action of ld. AO in making upward transfer pricing adjustment amounting to Rs.41,18,700/-.*

2. *The ld. CIT(A) has erred in law and on facts of the case in upholding the action of ld. AO in referring the case of the Appellant to the Transfer Pricing Officer. The ld. CIT(A) ought to have considered that under the facts and circumstances of the case, there was no reasons to interfere with the pricing adopted by the Appellant as the same is falling within the parameters of transfer pricing laid down under the scheme of the Act.*

3. *The ld. CIT(A) has erred in law and on facts of the case in upholding the action of ld. AO in invoking the provisions of Chapter X without prima facie demonstrating that there was some tax avoidance.*

4. *The ld. CIT(A) has erred in law and on facts of the case in upholding the action of ld. AO in making a reference to the Transfer Pricing Officer u/s.92C(3) r.w.s. 92CA(1) of the Act without providing any opportunity of being heard to the Appellant.*

5. *The ld. CIT(A) ought to have considered that in any case the whole reference and the consequent orders were bad and illegal because the alleged approval granted by the Commissioner of Income Tax u/s.92CA(1) of the Act in law firstly on account of fact that the Appellant was not heard before any such approval and secondly because the same has been granted mechanically, without any application of mind and without due diligence.*

6. *Both the lower authorities have erred in law and on facts of the case in not properly appreciating and considering various submissions, evidences and supporting documents submitted by the Appellant from time to time before passing the impugned order.*

7. *The ld. CIT(A) has erred in law and on facts of the case in confirming the action of ld. AO in charging interest u/s.234A/B/C/D of the Act.*

8. *The ld. CIT(A) has erred in law and on facts of the case in confirming the action of ld. AO in initiating penalty proceedings u/s.271(1)9c) of the Act without recording mandatory satisfaction as contemplated under the Act.*

3. The necessary facts required for disposing off the present appeal are that the assessee is a joint-venture of two companies namely Well Prospering Ltd a Chinese company and Kiri Dyes and Chemicals Ltd, an Indian company

which was entered as on 4th February 2010. The Indian company, Kiri Dyes and Chemicals Ltd, belongs to Dyestar Group of companies. In other words, the Dyestar group of companies became associated enterprises with effect from 4th of February 2010 of the assessee company. The assessee is engaged in the business of manufacturing of various types of synthetic dyes.

3.1. The assessee in the year under consideration has entered into certain international transactions, export of finished goods, with its AE namely Dyestar Group and Well Prospering Ltd. The assessee to determine the ALP of such transactions has used comparable uncontrolled price (CUP) method as the most appropriate method.

International transactions with Dyestar Group

3.2. The Dyestar Group of companies became the AE of the assessee in the year under consideration, dated 4th February 2010. Thus the assessee, to determine the ALP for the export of the goods to Dyestar Group of companies after 4th February 2010, compared the average price charged post 4th February 2010 with the average price for the export of the goods prior to 4th February 2010 as uncontrolled transaction. As per the assessee, the actual average price prior to 4th February 2010, with respect to its product namely Reactive Blue 250 comes at ₹ 177.10 per kg whereas the actual average price post 4th February 2010, with respect to its product namely Reactive Blue 250 comes at ₹169.19 per piece. Accordingly, the assessee claimed that it has charged the price from its AE after 4th February 2010 at the arm length price and therefore no adjustment is required to be made.

3.3. However, the TPO observed that price charged from its AE are varying significantly as evident from invoice wise details available on record.

Therefore, TPO was of the view that each invoice should be compared separately. The TPO was also of the view that uncontrolled price of other non AE should also be included for calculating the ALP of the comparables. Accordingly, TPO worked out the revised ALP of the comparables i.e. average of price charged form Dyestar group pre 04th February 2010 and price charged from other non AE. The TPO Compared the same with each invoice of exports made to different units of Dyestar group after 04th February 2010. During the proceedings, the TPO found that in case of two invoices with respect to the product namely Reactive Blue 250, the assessee has not charged price at ALP as there was variance of more than 5%. Thus the TPO issued show caused notice vide letter no. DCIT (TPO-II)/AHD/Kri Dyes/92CA(1)/12-13 dated 18th October 2013 purposing addition of Rs. 2,20,704/-in the following manner:

3.4. The assessee in response to such show cause notice made reply vide letter dated 29th October 2013 by submitting that non-AE entities cannot be considered as comparable while working out the ALP as these entities are located in different geographical areas.

3.5. Similarly, the assessee also contended that there is a significant difference in the quantity sold to AE (Dyestar Group of companies) and non-AE.

3.6. However, the TPO found that the assessee has not considered the geographical location for working out the ALP for the goods exported to the AE. As such the assessee itself has considered price of the export of the goods for its product namely reactive blue 250 to the Dyestar Group which is located in USA, Maxico and Brazil prior to the date of acquisition i.e. 4

February 2010. Accordingly, the AO held that the assessee cannot take different yardstick for its different products which is suitable to it for the purpose of comparability analysis.

3.7. The TPO for the 2nd objection raised by the assessee for the quantity of the goods sold i.e. 3000 kg to its non-AE, found that the assessee itself while taking the comparable has taken the quantity of 5000 kg sold prior to 4th of February 2010. Accordingly the TPO rejected the contention of the assessee by holding that if quantity 5000kg can be considered then there is no infirmity in considering quantity of 3000kg for the purpose of comparability analysis.

3.8. In view of the above, the TPO rejected the contention of the assessee and made an upward adjustment of Rs.2,20,704/- on account of transfer pricing by adding to the total income of the assessee.

International transactions with Well Prospering Ltd.

3.9. The assessee while working out the ALP for the international transactions for the export of goods with its AE i.e. Well Prospering Limited China has considered only the average price of the transactions carried out it with its non-AEs entities which was compared with average price charged from its AE for export of goods. Accordingly the assessee claimed that the price charged from its AE Well Prospering Limited are at arm length.

3.10. However, the TPO was of the view that the assessee should have also considered the transactions carried out by it with respect to the export of goods to Dyestar Group before 04th February 2010 while determining the ALP for its international transactions with the present AE. Thereafter, the average

price of the comparable should have been compared with each invoice raised by the assessee to its associated enterprises. Accordingly, the TPO worked out revised ALP of the comparables after considering price charged from Dyestar Group before acquisition i.e. 4-2-2010 along with price charged from other non AE. The revised ALP was compared with the actual price charged by the assessee for each invoices raised to its AE. It was found that some of the invoice issued for the product namely 'Reactive Red 195' and 'Reactive Black 5' were varying significantly. The relevant details are available on the pages 5 and 6 of the TPO order.

3.11. Accordingly, the TPO issued a show cause notice vide letter no. DCIT(TPO-II)/AHD/Kri Dyes/92CA(1)/12-13 dated 18th October 2013 purposing addition of Rs. 38,97,996/- for the upward adjustment on account of international transaction.

3.12. The assessee in response such show cause notice made reply vide letter dated 29th October 2013 by submitting that the AE (Well prospering Ltd) is located in the China whereas the Dyestar Group is mainly based in Europe and USA where the market conditions are different from the Asia .

3.13. The assessee also submitted that the products supplied in the Asian market were inferior in comparison to the quality of the products sold to Dyestar Group.

3.14. The assessee further contended that the products sold to the AE was 273,000 KG whereas the goods sold to the non-AEs were only of 57,500 KGs. As such the difference in the quantity would certainly lead to difference in the price and therefore, it would not give a correct picture.

3.15. However, the TPO found that the Dyestar group of companies are not only located in Europe and USA but also, the assessee is supplying its finished products to Dyestar Gropu, located in Indonesia and Brazil. Even otherwise the developed countries USA and Europe are excluded for the purpose of comparables, then the average rate increases from ₹139.51 to 142.08 per kg.

3.16. Similarly the TPO also found that the assessee has supplied goods to Dyestar Group for 246112 Kgs whereas the quantity supplied to the non-AE is only 57,500 therefore if the quantity supplied to Dyestar group is included then it would lead to a more accurate comparable.

3.17. In view of the above, the TPO included the Dyestar Group as comparable and made an upward adjustment of ₹38,97,996/- only on account of transfer pricing by adding to the total income of the assessee.

3.18. Finally, the AO made an upward adjustment of ₹41,18,700/- on account of transfer pricing by adding to the total income of the assessee.

4. Aggrieved assessee preferred an appeal to the learned CIT (A) who upheld the action of AO/TPO by observing as under:

"On a careful consideration of entire facts of the case, it is noted that the TPO has adopted CUP for comparing the International Transactions and determination of Arms' length price. It is noted that the international transactions have been made with those companies which were earlier not related to the appellant company and later on, on account of merger and acquisitions, the companies have become associated enterprises of the appellant company. The TPO has compared the rates at which the material was sold to those companies prior to becoming the associated enterprise with the rates at which the material ahs been subsequently sold by the

appellant company. He has also taken into account various objections reqgarding location and quantity of the dye. It is noted that no new objection or line of analysis has been pointed out by the appellant during the course of appellate proceedings. Further, the TPO has duly taken into account all the objections taken by the appellant at the stage before him. I am in complete agreement with his findings, and it is noted that the order of the TPO is well reasoned and detailed. The comparability analysis also has been properly done by him.

The claim of the appellant that when the purpose of comparison of the same entity (post acquisition) was available comparison with other non-AE was not required is without any basis. The method which has been adopted by the TPO is CUP and the comparison would be better, if the broader base of comparable uncontrolled transactions is taken. Therefore, the action of the AO was justified. It is noted that the appellant is charging different rate to the same company, prior to acquisition and post acquisition, and therefore, this has led to the adjustment in Arms' length price.

Regarding the objection taken by the appellant in respect of Dystar group, the appellant has pointed out that there is a geographical location, a difference with would affect the sale price of the product. It has rightly been pointed out by the TPO that the appellant itself did not consider the geographical differences while making the comparison in the Transfer Pricing study report. Similarly, in respect of Reactive Blue 250, the appellant had also not considered and differentiated between the geographical market. Therefore, the appellant should not raise objection of this point of time now.

Regarding the objection taken by the appellant regarding difference in quantity, it is noted that the appellant has contended that the quantities in bulk would be sold at less the price as compared to the less quantity. The objection of the appellant has also duly been taken care by the TPO in para-6.2.3 of its order. It has rightly been pointed out by him that there is not much difference between the quantity of 5000 Kg and 3000 Kg. The appellant had itself made the comparison of 20,000 Kg. and 5000 Kg.

In view of all these facts, I am of the considered opinion that the adjustments recommended by IPO are in order. The addition made by the AO accordingly, is upheld."

5. Being aggrieved by the order of the learned CIT (A) the assessee is in appeal before us.

6. The learned AR before us filed a paper book running from pages 1 to 178 and contended that the benefit of 5% variation should be calculated on the ALP of the comparables. But the TPO has wrongly applied the benefit of 5% variation with respect to the actual price charged by the assessee. Accordingly the learned AR worked out the ALP of the comparables at ₹168.85 after giving the benefit of 5% variation and compared the same with the actual average price charged by it from its AE i.e. 169.19 which is higher than the ALP of the comparables.

6.1. Similarly, the learned AR for the assessee also contended that the TPO has taken the average price of the comparables which was compared with the individual invoice raised by the assessee to the associated enterprises. As per the learned AR the TPO should have taken the same yardstick by taking the average price charged by the assessee after 4th February 2010 which comes out at ₹169.19 whereas the ALP of the comparable comes out at ₹168.85 only.

6.2. The learned AR, for the associated enterprises namely Well Prospering Ltd, contended that Dyestar group of companies being associated enterprise cannot be considered as comparables. The learned AR in support of his contention placed his reliance on the order of this tribunal in the case of Gemstone Glass Pvt Ltd.

6.3. The learned AR also contended that the TPO has taken the average price of the comparables which was compared with the individual invoices raised by the assessee to the associated enterprises. As per the learned AR the TPO should have taken the same yard stick by taking the average price charged by the assessee instead of individual invoice.

7. On the other hand, the learned DR vehemently supported the order of the authorities below.

8. We have heard the rival contentions of both the parties and perused the materials available on record. The facts of the case are not in dispute which have been elaborated in the preceding paragraph. Therefore we are not inclined to repeat the same for the sake of brevity and convenience.

8.1. In the present case, the issue relates to the determination of the ALP for the export of the finished goods made by the assessee with respect to two associated enterprises namely Dyestar and Well Prospering Ltd. To adjudicate the issue, we deal with the issue involved in the present appeal with the individual associated companies. Hence, we, first take up, the issue involved in the case of Dyestar Group.

8.2. The 1st issue arises for adjudication whether the TPO is right in comparing the average price of the comparables with the individual invoices raised by the assessee to the associated enterprises for determining the ALP. From the preceding discussion, we find that the assessee has compared the average price of the comparable companies with the average price of the goods exported to the associated enterprise. The assessee has worked out the average price of the comparable companies with respect to reactive below 250 at 177.10 which was compared with the average price of the goods exported at Rs.169.19. The assessee, has worked out the average price of the goods exported at Rs.169.19 after considering all the invoices subsequent to the post acquisition date 4th February 2010.

8.3. However, the TPO has compared each invoice for the export of the goods separately in order to determine whether it was at the ALP or not, instead of average price as claimed by the assessee.

8.4. To resolve the issue on hand, it is pertinent to refer the provisions of rule 10B(1) of Income Tax Rule which is reproduced as under:

> *1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction **[**or a specified domestic transaction**]** shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely:—*
>
> *(a) comparable uncontrolled price method, by which,—*
>
> *(i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified;*
>
> *(ii) such price is adjusted to account for differences, if any, between the international transaction **[**or the specified domestic transaction**]** and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;*
>
> *(iii) the adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction **[**or the specified domestic transaction**]** ;*

8.5. A plain reading of the above provision reveals that the provision of rule 10B(1)(a)(i) authorized to identify the comparable uncontrolled transaction or a number of such transactions. In other words the provisions of the rule permits to aggregate the comparable uncontrolled transactions for determining the ALP. However, the rule does not permit to aggregate the international transactions carried out by the assessee to work out the average price for the purpose of the comparison. In holding so we draw support and guidance from the order of the Delhi tribunal in the case of Tilda Riceland (P) Ltd vs. ACIT reported in 42 Taxmann.com 400 wherein it was held as under:

> *"The first thing as noticed is that the assessee has determined arm's length price of its transactions with the AEs by comparing average export price charged by the assessee to its AEs with the average uncontrolled export price. This approach is patently incorrect inasmuch as while under rule 10B (1)(a)(i), it is indeed open to compute ALP on the basis of price charged in a comparable controlled transaction or 'a number of such transactions', but the arm's length price so computed is, under rule 10B(1)(a)(iii), taken as arm's length price in respect of property transferred in the international transaction.*
>
> *The expression 'the international transaction' referred to in rule 10B(1)((a)(iii) is used in singular and does not permit taking into account, unlike rule 10B(1)(a)(i), 'a number of such transactions'. While averaging is thus permissible for the uncontrolled transactions, each international transaction is to be taken on stand-alone basis. It is not open to the assessee to compare the average price in his transactions with AEs with average price in uncontrolled transactions. [Para 18]"*

8.6. In view of the above, we are not impressed with the argument of the learned counsel for the assessee that the TPO erred in comparing the ALP of the comparable companies with the individual invoices raised by the assessee to the associated enterprise. Accordingly, we reject the same.

8.7. The 2nd issue arises for our consideration whether the benefit of 5% variation is to be calculated with reference to the ALP determined from the comparable uncontrolled transactions or at the price at which the assessee exported the goods. In this regard, we find pertinent to refer the relevant provisions as provided in the proviso to sub rule (7) of rule 10CA of the rules which is reproduced as under:

> *"(7) In a case where the provisions of sub-rule (4) are not applicable, the arm's length price shall be the arithmetical mean of all the values included in the dataset:*
>
> ***Provided** that, if the variation between the arm's length price so determined and price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed such percentage not exceeding three per cent of the latter, as may be notified by the Central Government in the Official Gazette in this behalf, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price."*

8.8. From the above provision, it is revealed that 1st of all the difference is worked out between the ALP of the comparable uncontrolled transactions and the price charged by the assessee with respect to its international transaction. That difference has to be seen with reference to the actual price charged by the assessee to work out the percentage.

8.9. For example, the rate of the ALP of the comparable uncontrolled transaction works out at ₹104 whereas the price charged by the assessee stands ₹100 leading to a difference of ₹4 only. Now this difference of ₹4 has to be seen in connection with the actual price charged by the assessee. As such percentage works out at 4% in this example.

8.10. Before parting, it is also pertinent to note that even assuming for the sake of understanding, the contention of the assessee is correct then also the difference between the ALP and the price charged by the assessee exceeds 5% therefore there cannot be any benefit to the assessee on account of such variation. For the ready reference, we calculate the difference as detailed below:

ALP of the comparable uncontrolled transactions	Rs. 177.74
Less : benefit of 5% variation	Rs. 8.89

8.11. The ALP after 5% variation comes to Rs.168.85 whereas the price charged by the assessee stands at ₹167.81 and ₹165.59 for the invoices which are in dispute.

8.12. At this juncture, it is also important to understand that the assessee has taken same entity (Dyester Group) as one of the comparable for the

transactions carried out by it before becoming such comparable company it's AE. The question arises whether such company can be considered for the purpose of determining the ALP. To resolve the controversy we find important to refer the provisions of section 92A (2) of the Act which reads as under:

(2) For the purposes of sub-section (1), two enterprises shall be deemed to be associated enterprises if, at any time during the previous year,—
****

8.13. From the above provision, it is revealed that a company shall become the associate enterprise of another company if at any time during the relevant previous year such company meets the criteria specified under the provisions of section 92A of the Act. Admittedly, the Dyestar Group of companies became the AE of the assessee in the year under consideration i.e. 4th February 2010. Thus, to our understanding such company cannot be taken as comparable company for the purpose of determining the ALP under rule 10A of the Rules as reproduced under:

> ***10A.*** *For the purposes of this rule and rules* ***[****10AB****]*** *to 10E,—*
> *(ab)****]*** *"uncontrolled transaction" means a transaction between enterprises other than associated enterprises, whether resident or non-resident;*

8.14. Thus, what is left is the non-AE party transactions carried out by the assessee during the year under consideration for the purpose of determining the ALP which works out at Rs. 191.52 which is much more than the price charged by the assessee with the associated enterprise. However, it is not issue arising from the order of the authorities below and similarly neither the learned AR nor the learned DR brought to our notice at the time of hearing. Accordingly, we do not touch upon such issue as discussed above. It is also important to note that the ITAT Mumbai in the case of in case of *Vodafone India Services (P.) Ltd.* v. *ACIT* [2014] 52 taxmann.com 241 has held as under:

122". . . . . Thus once two enterprises are associated enterprisesat any time during the previous year they shall be deemed to be theassociated enterprises for the purpose of section 92A (1). Having held thatboth HTIL and VIH BV were the associated enterprises of the assesseeduring the year under consideration; it makes no difference whether thecall centre sale transaction was preceded to the STA of subsequent to theSTA. This aspect is relevant only to the extent that at the time of transfer ofcall centre business, the assessee was subsidiary of HTIL or VIH BV. As perthe clause 8.8 (j) of the SPA, the HTIL was under the obligation to deliveror procure the delivery to the purchaser (VIH BV), the GSPL transferagreement duly executed by the parties thereto. GSPL transfer agreement isdefined in the definition and interpretation clause 1 of the SPA as under"

8.15. In view of the above, and after considering the facts in totality, we do not find any infirmity in the order of the authorities below for making such upward adjustment of Rs. 2,20,704/- to the total income of the assessee.

8.16. Moving to the international transactions carried out by the assessee with Well Prospering Ltd, the 1st issue arises for our consideration whether the transactions carried out with the AE can be considered as one of the comparable for determining the ALP for the purpose of the comparison. Admittedly, the Dyestar Group of companies became the AE in the year under consideration dated 4th of February 2010. The provisions of section 92A(2) clearly states that a company shall become AE of another company at any time during the year under consideration if it meets the criteria provided under section 92A of the Act. Once the comparable company becomes the AE of the assessee in the year under consideration, then such company cannot be considered for the purpose of comparable. In holding so we place our reliance on the order of this tribunal in the case of Gemstone Glass Pvt Ltd. reported in 63 taxmann.com 1 wherein it was held as under:

"The first essential input for application of CUP method is the price charged or paid for similar product in a transaction between two enterprises, whether resident or

non-resident, which are not associated enterprises. In the present case, the comparable price adopted for determining the arm's length price is the price at which the assessee has sold the same product to other group entities, which are, thus, 'associated enterprises', residents in India. It has been defended by the DRP on the ground that there cannot be any tax avoidance motive in selling the products at an artificial price. However, this aspect of the matter is irrelevant inasmuch as the very definition of 'uncontrolled transaction' under rule 10A excludes the transactions with associated enterprises 'whether resident or non-resident'. Once it is not in dispute that 'uncontrolled transaction' is a statutorily defined term, there is no room for discarding or questioning this definition on the basis of superior logic in an alternative definition. Such heroics are not called for in the process of judicial interpretation. Whether the transactions are with associated enterprises resident in India or with associated enterprises resident outside India, the prices at which such transactions are entered into with such enterprises cannot be taken as 'comparable uncontrolled price' for the purpose of determining the arm's length price. [Para 6]

It is, therefore, the prices on which the assessee has sold the same products to resident associated enterprises cannot be taken as benchmark for ascertaining the arm's length price of its similar sale transaction with the non-resident enterprise. Once necessary inputs for ascertaining the ALP under CUP are not available, there cannot be any occasion to apply the same. In the assessment year 2008-09, the TPO himself abandoned the CUP method and restored to cost plus method. [Para 8]"

8.17. Going forward, we also note that the assessee in itself has taken Dyestar Group of companies as 1 of the comparable in its transfer pricing study which was also not disputed either by the TPO or learned CIT (A). Now the question arises, whether such issue can be raised by the assessee before us. In this regard we note that it is the duty of the income tax authorities to implement the provisions of Income Tax Act while framing the assessment. In other words, if the assessee has made a mistake in the interpretation of the provisions of the Act then it is the duty of the authorities to rectify such mistake. Accordingly, it is inferred that assuming the assessee has paid the taxes on the items of income which were not chargeable to tax under the misconception of the provision of the Act. The income tax authorities are duty-bound to correct such mistake and extend the necessary relief to the assessee. Thus the income tax authorities cannot exercise their jurisdiction with respect to the matters which has not been authorized under the provisions of law despite the fact that the assessee has given his consent.

8.18. In holding so, we draw support and guidance from the order of Delhi tribunal in case of Tilda Riceland (P) Ltd. (Supra) where it was held as under:

> *"As a quasijudicial authority, and while pursing the goal of justice, one cannot remain at the mercy of the wisdom of representatives of the parties appearing before such an authority; it is bounden duty of every quasijudicial authority to appreciate the scope of the legal provisions and apply them in letter and in spirit."*

8.19. Now, keeping the above principles in mind, we move to decide the issue on hand. Admittedly, the assessee in the transfer pricing study has taken Non-AE as comparable but the TPO has considered the only those transactions carried out with the AE (Dyester Group) prior to 4th February 2010 i.e. before it became the AE as comparable which is not permissible under the provisions of rule 10A(ab) r.w.s 92A(2) which reads as under:

10A. *For the purposes of this rule and rules* ***[****10AB****]*** *to 10E,—*
*(ab)****]*** *"uncontrolled transaction" means a transaction between enterprises other than associated enterprises, whether resident or non-resident;*

8.20. In holding so, we also draw support and guidance from the order of this tribunal in the case of Gemstone Glass Pvt Ltd reported in 63 Taxman.com 1. The relevant extract of the order has already been reproduced in the preceding paragraph.

8.21. In view of the above, we hold that the assessee has mistakenly considered one of its AE (Dyester Group) as the comparable in its transfer pricing study report for the transaction carried out with the Dyester Group only as discussed above, but the income tax authorities were duty-bound to rectify such mistake as discussed in the preceding paragraph.

8.22. Now coming on the merit of the case, if we exclude the Dystar Group as 1 of the comparable for determining the ALP, then the arm length price comes out at Rs. 115.5 and Rs. 122.66 for product namely 'Reactive Red 195' and 'Reactive Black 5' respectively whereas the price charged by the assessee from the AE ranges between Rs. 108.75 to 128.12 for product 'Reactive Red 195' and Rs. 110.06 to Rs. 115.22 for 'Reactive Black 5'. Accordingly, we direct the AO/TPO to compare the ALP with the each invoice raised by the assessee and wherever he finds the difference exceeding 5% of the actual price, make necessary adjustments. Hence the ground of appeal of the assessee is partly allowed.

9. In the result, the appeal of the assessee is partly allowed for statistical purpose.

This Order pronounced in Open Court on	**19/08/2020**

Sd/-
(RAJPAL YADAV)
VICE PRESIDENT

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 19/08/2020
टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-2, Ahmedabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित **//True Copy//**प्रति

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
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